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No. 88-1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALTON & SOUTHERN LODGE NO. 306,
BROTHERHOOD OF RAILWAY CARMEN OF THE
UNITED STATES AND CANADA,
Petitioner,

VS.

THE ALTON & SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a court must look beyond the terms of a collective bargaining agreement to evidence of past practice for purposes of determining whether a dispute is minor or major under the Railway Labor Act when the parties' interpretations arguably are comprehended by the express language of the agreement.

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SUPPLEMENTAL STATEMENT OF CASE

A. APPLICABLE COLLECTIVE BARGAINING PROVISIONS AND PROCEEDINGS IN THE COURTS BELOW

Petitioner's statement of the case and Appendix F (A-44) omits relevant facts crucial to the holding of the United States Court of Appeals for the Eighth Circuit. Respondent thus supplements Petitioner's statement.

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[1] In accordance with Supreme Court Rule 28, Respondent's parent subsidiary, and affiliated companies include: Missouri Pacific Railroad Company and St. Louis Southwestern Railroad Company, Southern Pacific Railroad Company, and Denver, Rio Grande and Western Railroad Company.

Petitioner Alton & Southern Lodge No. 306 is a labor organization representing carmen employed by Respondent, The Alton & Southern Railway Company. Petitioner and Respondent are parties to a collective bargaining agreement covering rates of pay, work rules and working conditions. The agreement provides in relevant part as follows:

> **Rule 1:** Eight (8) hours shall constitute a day's work, and five (5) days per week for the regular forces.
>
> . . .
>
> NOTE: The expressions "positions" and "work" used in this Rule refer to service, duties or operations, necessary to be performed. . .
>
> **Rule 2:** When one shift is employed, the starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m. The time and length of the lunch period shall be subject to mutual agreement with the Committee.
>
> **Rule 3:** When more than one shift is employed, the starting time of the first shift shall be governed by Rule 2. The starting time of the second, or the second and third shifts shall be arranged for the best interest of the work to be performed, but in no case inconsistent with the employee's welfare. Each shift shall consist of eight (8) consecutive hours, including an allowance of twenty (20) minutes for lunch within the limits of the fourth and fifth hours. When service requirements will not permit the taking of the lunch period within the fourth and fifth hours as per this rule, a penalty time of twenty (20) minutes a pro rata rate will be allowed and the employee will be allowed to procure lunch without loss of time as soon thereafter as possible.
>
> **Rule 7:** Employees assigned under the provisions of Rule 2 required to work during the lunch period will be paid for one-half hour straight time and be allowed the necessary time to procure lunch without loss of time.

Appendix A-1.

Article V of the Agreement provides a grievance procedure for resolving disputes concerning interpretation or application of the Agreement. If the parties are unable to settle the matter through the grievance process, either party may appeal to the National Railroad Adjustment Board ("NRAB") for a final and binding decision on the merits pursuant to Section 3 of the Railway Labor Act ("RLA"), (Appendix A-1, 45 U.S.C. § 153 *et. seq.*).

After Petitioner filed this suit in state court, it *did* submit the case to the NRAB for resolution as a minor dispute under RLA procedures. The state court case was removed to the United States District Court for the Eastern District of Missouri and tried without a jury. On August 27, 1986, following trial but prior to the District Court's decision, the NRAB ruled on the merits of the dispute. The NRAB held that Rule 2 of the contract clearly provides for a change in hours and "failure to achieve mutual agreement over the timing and length of the lunch period cannot be converted into a power of veto," denying Petitioner's claim. *Brotherhood Railway Carmen v. Alton and Southern Railway Co.*, Award 10964 at 3 (NRAB August 27, 1986). On September 10, 1986, Respondent moved the District Court to reopen the record to include the NRAB decision. The District Court held that this controversy was a minor dispute, however, and denied Respondent's motion as moot. Respondent cross-appealed from the denial of this motion. The Eighth Circuit Court of Appeals affirmed the District Court's characterization of the dispute as minor and therefore also found Respondent's motion moot.

B. The United States Court Of Appeals For The Eighth Circuit's Holding

This dispute centers around Respondent's changing the starting time, time and duration of lunch, and the activities for which it pays carmen. The parties have stipulated to the rele-

vant facts underlying this dispute which are summarized in the decision of the Eighth Circuit Court of Appeals. *See Alton & Southern Lodge No. 306, Brotherhood Railway Carmen of the United States and Canada v. The Alton & Southern Railway Co.*, 849 F.2d 1111, 1112-13 (8th Cir. 1988) ("Alton & Southern").

For approximately thirty (30) years carmen reported to work at 7:00 a.m. and quit work at 3:00 p.m., with a twenty (20) minute paid lunch period included. Respondent notified Petitioner of its desire to change the working hours for carmen to 8:00 a.m. - 4:30 p.m., with an unpaid lunch period. The parties engaged in negotiations over this issue, but were unable to reach agreement. On November 22, 1987, Respondent implemented its proposed changes. *Id.* at 1113.

Petitioner contended that this change created a "major dispute," thus entitling it to injunctive relief. The Eighth Circuit Court of Appeals affirmed the District Court's holding that the dispute between the parties was "minor" because the changes which Respondent implemented were "arguably comprehended" by the express terms of the collective bargaining agreement and because the agreement was "reasonably susceptible to" Respondent's interpretation of its terms. *Id.* at 1114-15. The District Court held that evidence of past practice presented by Petitioner was not "dispositive" because it could not be used to contradict the explicit language of the collective bargaining agreement and convert the dispute into a major dispute. *Id.* at 1114. The Court went on to explain why it believed the changes implemented by Respondent arguably were comprehended by the express terms of the collective bargaining agreement:

> The terms of the agreement for a single shift cover starting time, *see* Rule 2 ("starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m."), the time and duration of lunch, *see Id.* ("[t]he time and length of the lunch period shall be subject to mutual

agreement with the Committee''), and for what activities the employees will be paid. *See* Rule 1 (employees must perform necessary service or duties for eight hours each day). We agree with the district court that in light of these express provisions, evidence of past practices is not controlling.

Alton and Southern's interpretation that it may change the starting time to 8:00 a.m. is at least arguably comprehended within Rule 2. Lodge 306 does not contest this point. Rule 2 also expressly provides that the time and length of the lunch period ''shall be subject to mutual agreement with the Committee.'' Alton and Southern complied with this provision, twice attempting to negotiate a new agreement before exercising its right to effect a unilateral change during the resolution of the minor dispute. *See Burlington Northern,* 802 F.2d at 1021. Similarly, the terms of the agreement also arguably comprehend Alton and Southern's interpretation of the issue of payment for time spent eating lunch. Rule 1 provides that employees will receive eight hours of pay for eight hours of work and defines work in such a way as to exclude, at least arguably, eating lunch. In addition, Rule 7 can be read reasonably to imply that lunch is unpaid, because it requires Alton and Southern to pay employees one-half hour of straight time if they must work through lunch. By contrast, Rule 3 expressly provides for a paid lunch when two or three shifts are employed, a provision that is conspicuously absent from the rule governing a single shift. For these reasons, we find that Alton and Southern has met its ''relatively light burden'' of demonstrating that its interpretation is arguably comprehended within the agreement and that therefore the dispute is minor. *See Burlington Northern,* 802

> F.2d at 1022. Furthermore, even considering past practices in conjunction with the agreement, we do not find Alton and Southern's interpretation so unreasonable as to be "obviously unsubstantial." *Flight Attendants,* 655 F.2d at 159 (citation omitted).

Alton & Southern, 849 F.2d at 1114-15.

ARGUMENT AGAINST ALLOWANCE OF WRIT

Respondent submits this case presents no issue worthy of consideration by this Court. Petitioner would have this Court undermine the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") and arbitration procedures of the RLA by permitting labor organizations to obtain status quo injunctions where the dispute involves conflicting evidence of past practice and interpretations arguably comprehended within the express language of a collective bargaining agreement. Petitioner improperly attempts to bring this case within the past practice rule enunciated by this Court in *Detroit & Toledo Shore Line Railroad v. United Transportation Union,* 396 U.S. 142, 90 S. Ct. 294 (1969) ("Shore Line"). *Shore Line* and other decisions cited by Petitioner clearly are distinguishable because they did not involve situations in which specific contractual language conflicted with evidence of the parties' past practice. The instant case presents a classic minor dispute between a carrier and union over the interpretation and application of language in an existing collective bargaining agreement relating to rates of pay, work rules and working conditions. While evidence of past practice is relevant in deciding the ultimate issue of the lawfulness of Respondent's actions, this is a task for the NRAB, not the courts.

The United States Court Of Appeals For The Eighth Circuit Applied The Proper Legal Standard

Under the RLA, disputes fall into two "sharply distinguished" categories. *See Elgin, Joliet & Eastern Railway Co. v. Burley,* 325 U.S. 711, 722, 65 S. Ct. 1282, 1290 (1945), *aff'd on rehearing,* 327 U.S. 661, 66 S. Ct. 721 (1946) ("Elgin"). The first category, known as "minor" disputes, involve disputes over existing rights and encompass controversies rooted in the meaning or proper application of collective bargaining agreement provisions relating to rates of pay, work rules or working conditions. *Id.,* 325 U.S. at 723, 65 S. Ct. at 1289-90. *See* 45

U.S.C. §153, First (i). If attempts to settle a minor dispute are unsuccessful, the RLA compels the parties to submit the matter to the NRAB for final and binding arbitration. 45 U.S.C. §153, First (i), (m). The NRAB's jurisdiction to review disputes is exclusive and the RLA does not permit a court to determine, in the first instance, the merits of a minor dispute. *See Gainey v. Brotherhood of Railway and Steamship Clerks,* 275 F.2d 342 (3d Cir.), *cert. denied.,* 363 U.S. 811, 80 S. Ct. 1248 (1960). Further, if the surrounding circumstances are ambiguous, the courts favor construing disputes as minor. *See Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.,* 768 F.2d 914, 920 (7th Cir. 1985).

The second category of disputes, known as "major" disputes, relate to collective bargaining for a new or amended contract, or unilateral alteration of a contract term by a party to obtain future rights. *Elgin,* 327 U.S. at 723, 65 S. Ct. at 1290. "Therefore the issue is not whether an existing agreement controls the controversy." *Id. See* 45 U.S.C. §156. Major disputes cannot be resolved by reference to or in a manner contemplated by the existing collective bargaining agreement, and injunctive relief may be granted to preserve the status quo if a party invokes the mediation and conciliation service provided by the National Mediation Board ("NMB"). *Elgin,* 327 U.S. at 723, 65 S. Ct. at 1290. The parties are then free to resort to unilateral action should mediation prove unsuccessful. 45 U.S.C. §156.

Petitioner's argument, simply stated, is that the Eighth Circuit Court of Appeals should have determined "as a matter of law" that the evidence of past practice is so compelling in this case that it rises to the level of an implied term of the parties' contract and supplants any contrary provision previously bargained for and expressly included therein. Thus, Petitioner's rationale compels the conclusion that the changes implemented by Respondent constitute a major dispute due to unilateral alteration of a contract, entitling Petitioner to injunctive relief to preserve the status quo. Petitioner's argument goes to the

merits of this dispute and ignores the applicable tests used by the federal courts to categorize disputes arising under the RLA. More importantly, Petitioner's position totally disregards the purpose and scope of the nonjudicial mechanisms created by Congress for resolving such disputes.

While attempting to convince the District Court that this dispute should be categorized as a major dispute, Petitioner simultaneously arbitrated the merits of its claim before the NRAB. Presumably if Petitioner had convinced the NRAB that its interpretation of the collective bargaining agreement was appropriate, it would have abandoned its position that this is a major dispute. Unhappy with the interpretation given by the NRAB, however, Petitioner now asks this Court to declare, as a matter of law, that Respondent's action was a unilateral alteration of, or addition to, the collective bargaining agreement, and it is entitled to a status quo injunction and mediation.

Petitioner's actions in pursuing this matter through the judicial system fly in the face of Congress' clear meandate that the NRAB's decision is final and binding on both parties. In enacting the RLA, Congress expressly provided this principle of finality to keep minor disputes out of the courts. *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 94, 99 S.Ct. 399, 402 (1978).

The Eighth Circuit applied well-settled legal standards for determining whether a dispute is minor or major under the RLA. The Court of Appeals panel affirmed the District Court's finding that the parties' past practices were 'clearly relevant,' to ascertaining the content of the collective bargaining agreement, but "did not supply a term or condition of the working relationship between the parties that was *not included* within the written agreement." *Alton & Southern,* 849 F.2d at 1114 (emphasis added) (citing *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.,* 802 F.2d 1016, 1022 (8th Cir. 1986) ("Burlington Northern"). Because express

contractual language governing the parties' dispute is contained in the collective bargaining agreement, the panel correctly held past practice is not "dispositive" for purposes of determining whether a dispute is minor or major. *Id.* The panel went on to find Respondent met its "relatively light burden" of demonstrating that its interpretation is 'arguably comprehended' within the agreement and is therefore a minor dispute. *Id.* at 1115.

Contrary to Petitioner's assertion, the characterization of the terms of the agreement is a finding of fact governed by the clearly erroneous standard of appellate review. *Id.* at 1114. *See Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985); *Brotherhood of Maintenance of Way Employees v. Chicago and North Western Transportation Co.,* 827 F.2d 330, 334 (8th Cir. 1987), *cert. denied,* 108 S. Ct. 1291 (1988). After ascertaining the content of the collective bargaining agreement, the panel properly applied the appropriate legal standard to determine whether the dispute was a minor or major dispute under the RLA.

The Holding of the United States Court Of Appeals For The Eighth Circuit Is Consistent With Applicable Decisions of the Supreme Court and the Other Circuits

The holding of the Eighth Circuit Court of Appeals is consistent with the decisions of this Court and other federal courts of appeals confronted with the same issue. In determining whether a dispute is minor or major, the courts need not look to past practice when a collective bargaining agreement contains language covering the dispute. When the language of the parties' collective bargaining agreement makes a railroad's position arguably correct, the court's inquiry is at an end. The Sixth Circuit succinctly stated the scope of the court's limited review as follows:

> Past practice cannot make a construction which has already been determined to be arguable frivolous

> or a substantial argument insubstantial. Evidence such as this is to be used in determining the ultimate meaning of the Agreement (citation omitted) ... but that is a task for arbitrators, not for courts. When making only a provisional determination that the railroad's action is arguably sanctioned by the agreements, evidence of past practice is not dispositive in the face of contrary indications from the agreement's language.

Brotherhood Railway Carmen of the United States and Canada v. Norfolk and Western Railway Co., 745 F.2d 370, 377 (6th Cir. 1984) ("Norfolk and Western").

In the present case, the express terms of the contract arguably comprehend the changes which Respondent implemented and is not silent regarding those changes. The Eighth Circuit panel applied the proper legal standard in a manner consistent with the decisions of other federal courts. *See Railway Labor Executives Ass'n v. Norfolk and Western Railway Co.*, 833 F.2d 700, 704 (7th Cir. 1987) (where parties disagree as to whether past practice or existing contract permits challenged action, the dispute is minor unless carrier's claimed contractual justification is "frivolous" or "obviously insubstantial"); *Norfolk and Western*, 745 F.2d at 377; *Airline Pilots Ass'n v. Trans World Airlines, Inc.*, 713 F.2d 940, 948 (2d Cir. 1983), *aff'd in part, rev.'d in part sub. nom, Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (court held minor dispute despite evidence of past practice where there is "clearly governing" language in the collective bargaining agreement); *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968) (court must determine if position of one of parties is "arguably predicated" on the terms of the agreement); *United Transportation Union v. Norfolk and Western Ry. Co.*, 605 F. Supp. 169, 171 n.1. (W.D. Va. 1985) (consideration of past practice only necessary when an "arguably applicable" provision is absent from written agreement).

Petitioner's argument is based primarily upon the misapplication of this Court's holding in *Shore Line*. *Shore Line* "dealt only with the scope of the status quo requirement in a dispute that all parties assumed to be major." *Norfolk & Western,* 745 F.2d at 376. Moreover, the Eighth Circuit correctly noted that *Shore Line* and the past practice cases cited by Petitioner did not involve "disputes covered by the written terms of a bargaining agreement." 849 F.2d at 1114, n.2 (distinguishing: *Shore Line; Brotherhood of Maintenance of Way Employees v. Chicago and North Western Transp. Co.,* 827 F.2d 330, 334 (8th Cir. 1987); *Burlington Northern,* 802 F.2d at 1022; *Independent Federation of Flight Attendants v. Trans World Airlines,* 655 F.2d 155, 159 (8th Cir. 1981)).

Petitioner's argument that the Eighth Circuit's decision effectively overrules *Shore Line* and other precedent also misstates the Eighth Circuit's holding. That court merely held that when the express terms of the collective bargaining agreement are "reasonably susceptible" to the parties' interpretation, there is no need to consider the parties' past practices for purposes of classifying a dispute as minor or major. In fact, the court specifically looked to the parties' practice and the language contained in the collective bargaining agreement to determine what the terms of the agreement were and whether the dispute involved unilateral changes in the status quo or a dispute over the interpretation or application of the agreement. If the collective bargaining agreement is silent regarding the changes, evidence of the parties' past practice could then be dispositive. Moreover, consideration of the parties' past practice would not automatically convert a dispute into a major dispute. Such a finding would depend upon whether the changes in question are arguably comprehended by the parties' past practices. *Burlington Northern,* 802 F.2d at 1016, 1022.

Petitioner also presents no compelling policy reasons for this Court to grant its Petition for Writ of Certiorari. The specter of unilateral action by carriers running roughshod over labor

organizations and employees and massive labor unrest and strikes is completely unfounded in law or fact. Carriers are restrained by the express terms and interpretations "arguably comprehended" within the scope of a collective bargaining agreement and the RLA. The RLA specifically permits an aggrieved party to seek redress through the mandatory arbitration provisions of the NRAB. Contrary to Petitioner's assertions, the Eighth Circuit's standard is consistent with the statutory scheme of the RLA and adequately safeguards the rights of parties in categorizing minor and major disputes without becoming needlessly entangled in the merits of litigation.

Respondent submits that the standard applied by the Eighth Circuit Court of Appeals in determining whether a dispute is minor or major under the RLA properly safeguards the exclusive jurisdiction of the NRAB, prevents the federal courts from becoming entangled in the merits of disputes which arguably are within the NRAB's jurisdiction, and eliminates the possibility of conflicting decisions between the NRAB and the courts. The present case clearly demonstrates this principle since Petitioner pursued its grievance through the grievance process in the contract and then to the NRAB, where Respondent prevailed on the merits of Petitioner's claim.

CONCLUSION

This case involves a straightforward dispute between a carrier and labor organization over existing rights expressly covered by a collectve bargaining agreement governing pay rates, rules and working conditions. There is no conflict between the Eighth Circuit Court of Appeals' decision and existing Supreme Court precedent or decisions of the other United States Circuit Courts of Appeals. Therefore, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

AGREEMENT

between

ALTON AND SOUTHERN RAILROAD

and

SYSTEM FEDERATION NO. 154,
RAILWAY EMPLOYEES' DEPARTMENT,
A.F.L. — C.I.O.

Establishing

Rules, Rates of Pay, and Working Conditions
for
Machinists, Boilermakers, Blacksmiths, Sheet Metal
Workers, Carmen, and their respective
Apprentices and Helpers,
employed in various
departments.

RULE 1. Eight (8) hours shall constitute a day's work, and five (5) days per week for the regular forces.

. . .

RULE 2. When one shift is employed, the starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m. The time and length of the lunch period shall be subject to mutual agreement with the Committee.

RULE 3. When more than one shift is employed, the starting time of the first shift shall be governed by Rule 2. The starting time of the second, or the second and third shifts shall be arranged for the best interest of the work to be performed, but in no case inconsistent with the employee's welfare. Each shift

shall consist of eight (8) consecutive hours including an allowance of twenty (20) minutes for lunch within the limits of the fourth and fifth hours. When service requirements will not permit the taking of the lunch period within the fourth and fifth hours as per this rule, a penalty time of twenty (20) minutes at pro rata will be allowed and the employee will be allowed to procure lunch without loss of time as soon thereafter as possible.

RULE 7. Employees assigned under the provisions of Rule 2 required to work during the lunch period will be paid for one-half hour at straight time and be allowed necessary time to procure lunch without loss of time.

NOTE: The expressions "positions" and "work" used in this Rule refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

AGREEMENT AND MEMORANDUM DATED AUGUST 21, 1954 AND LETTER OF UNDERSTANDING DATED AUGUST 21, 1954 BETWEEN RAILROADS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES AND THE EMPLOYEES OF SUCH RAILROADS REPRESENTED BY THE EMPLOYEES' NATIONAL CONFERENCE COMMITTEE, FIFTEEN COOPERATING RAILWAY LABOR ORGANIZATIONS.

(Note: These documents exclude employees represented by the Hotel and Restaurant Employees and Bartenders International Union.)

and

AGREEMENT AND MEMORANDUM DATED AUGUST 21, 1954 BETWEEN RAILROADS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES AND THE EMPLOYEES OF SUCH RAILROADS REPRESENTED BY THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION.

ARTICLE V — CARRIERS' PROPOSAL NO. 7

Establish a rule or amend existing rules as to provide time limits for presenting and progressing claims or grievances

This proposal is disposed of by adoption of the following:

The following rule shall become effective January 1, 1955:

1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the re-

jection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.